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No. 03-1715

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IN THE

Supreme Court of the United States

PHILIP MORRIS USA INC., PETITIONER

v.

JAMES A. LEWIS D/B/A B&H VENDORS; ALL BRANDS VENDING CO.; B&G ENTERPRISES, LTD.; BELFIORE MUSIC & CIGARETTE CO.; CLASS A VENDING; C.I.C. CORPORATION; EAGLE COIN MACHINE; MELO-TONE VENDING, INC.; PENN TRIPLE S T/A PENN VENDING COMPANY; AND T.D. ROWE CORPORATION.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether Respondents presented evidence sufficient to overcome a motion for summary judgment on the question of whether they, as indirect purchasers, meet the definition of a "customer" and "purchaser" under Sections 2(d) and 2(e) of the Robinson-Patman Act, according to *FTC v. Fred Meyer, Inc.*, 390 U.S. 341 (1968).

CORPORATE DISCLOSURE STATEMENT

Respondents are James A. Lewis d/b/a B&H Vendors; All Brands Vending Co.; B&G Enterprises, Ltd.; Belfiore Music & Cigarette Co.; Class A Vending; C.I.C. Corporation; Eagle Coin Machine; Melo-Tone Vending, Inc.; Penn Triple S t/a Penn Vending Company; and T.D. Rowe Corporation.

Pursuant to Supreme Court Rule 29.6, Respondents state that none of the corporate Respondents have parent corporations, and no publicly held corporations own 10 percent or more of the stock in any corporate Respondent.

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents James A. Lewis d/b/a B&H Vendors; All Brands Vending Co.; B&G Enterprises, Ltd,; Belfiore Music & Cigarette Co.; Class A Vending; C.I.C. Corporation; Eagle Coin Machine; Melo-Tone Vending, Inc.; Penn Triple S t/a Penn Vending Company; and T.D. Rowe Corporation, by counsel, respectfully request that this Court deny the Petition for Writ of Certiorari filed by Petitioner, Philip Morris USA, Inc. (hereinafter "Philip Morris"), seeking review of the decision of the United States Court of Appeals for the Sixth Circuit. Respondents are owners and operators of cigarette vending machines. Petitioner, Philip Morris, is the largest manufacturer of cigarettes in the United States. Philip Morris offers and distributes promotional fees, cash rebates, display facilities and advertising materials *directly* to retailers, other than cigarette machine vendors, engaged in the sale of cigarettes on a per pack basis. These favored retailers include convenience stores, mini-marts, gas stations and newspaper kiosks (collectively hereinafter "convenience stores"). As a result of their exclusion from these nationwide promotional programs, Respondents brought an action under Sections 2(a), 2(d) and 2(e) of the Robinson-Patman Act (the "Act"). 15 U.S.C. §§ 13(a), 13(d) and 13(e).

PROCEEDINGS BELOW

The district court granted summary judgment in favor of Philip Morris on grounds that eight out of the ten Respondents lacked standing as "customers" of Philip Morris because they purchase Philip Morris

cigarettes through wholesalers, rather than from Philip Morris directly, and, alternatively, against all Respondents on a finding they could not demonstrate the existence of competition between themselves and the favored retailers. *Petition for Writ of Certiorari* (hereinafter, "*Petition*"), at 47a – 73a. On appeal, a panel of the Court of Appeals for the Sixth Circuit reversed the grant of summary judgment on Count I of the Complaint (violations of Sections 2(d) and 2(e) of the Act) as to all plaintiffs; reversed summary judgment on Count II (violation of Section 2(a) of the Act) as to those plaintiffs who purchase directly from Philip Morris, and affirmed on Count II as to those who purchase indirectly. *Lewis v. Philip Morris, Inc.*, 355 F.3d 515, 519 (6th Cir. 2004); *Petition*, at 2a. Philip Morris challenged the panel's ruling that Respondents who purchase cigarettes through wholesalers have standing to sue under Sections 2(d) and 2(e) of the Act in a petition for rehearing *en banc*. No judge on the Sixth Circuit voted in favor of rehearing, and the petition was denied on March 30, 2004. *Petition*, at 74a. Philip Morris is not seeking review of the ruling below that Respondents presented sufficient evidence of competition with convenience stores to overcome a motion for summary judgment. *Lewis*, at 530-33; *Petition*, at 27a-34a. Nor is it seeking review of the ruling below that sufficient evidence exists to overcome a motion for summary judgment and to proceed to trial with regard to those Respondents who purchase directly from Philip Morris under Sections 2(a), 2(d) and 2(e) of the Act. *Lewis*, at 519; *Petition*, at 2a. Except for a dispute over Philip Morris' disclosure of a consumer study, discovery is closed and the case is ready for trial before the district court.

COUNTERSTATEMENT OF THE CASE

Prior to November 1998, Philip Morris included Respondents in its promotional programs; it paid fees directly to cigarette machine vendors based on the location, or slot, allotted to Philip Morris products in a vending machine, it also supplied cigarette machine vendors with advertising and signage designed for placement on a vending machine. Philip Morris cancelled all promotional programs benefiting cigarette machine vendors at the same time it initiated the series of promotional programs for convenience stores that are the subject of Respondents' lawsuit. Convenience stores receive cash rebates, promotional fees, display facilities and advertising materials *directly* from Philip Morris. JA, at 176, 732.[1] Participating convenience stores are served *directly* by Philip Morris' field representatives. Cash rebates, based on the volume of product sold during a promotional period, are paid to participating convenience stores *directly* from Philip Morris on a monthly basis. The field representatives solicit individual convenience store participation in Philip Morris' promotional programs and conduct periodic inspections of participating convenience stores to insure compliance with program requirements including (1) the location of product displays, (2) interior and exterior signage, (3) rack space allocations, and (4) point-of-sale advertising materials. JA, at 176, 702-04. Convenience stores are required to provide Philip Morris with detailed sales reports on a monthly basis. JA, at 704. The decision below outlines

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[1] "JA at ___" refers to the Joint Appendix submitted to the Sixth Circuit in this case.

the substantial record evidence of Philip Morris' direct and sustained dealings with its favored retailers in the provision of its discriminatory promotional services. *Lewis*, at 537; *Petition*, at 41a-42a. The volume of direct payments by Philip Morris to its favored retailers is staggering. In the fourth quarter of 1998 alone, the top 20 chain accounts participating in only one promotional program received a total $40,946,763. JA, at 227.

The repeated assertion by Philip Morris that there is no evidence in the record that it sells directly to convenience stores competing with Respondents, and other cigarette machine vendors, is false and misleading. Philip Morris' Director of Sales Promotions and Communications states by affidavit, "Philip Morris sells its cigarettes in the United States to wholesalers, *direct-purchasing retailers* and the federal government." JA, at 1276 (*emphasis added*). Certain regional convenience store chains that purchase cigarettes directly from Philip Morris and also compete with the Respondents are identified in the record: "Ralph's Grocery Stores, Wawa, Cumberland Farms, Lucky Grocery Stores, and Albertson's." JA, at 1277. From the limited payment information made available by Philip Morris to date it is clear that promotional benefits received by Respondents' direct-purchasing competitors are substantial: Ralph's Grocery Stores received $1,006,793 in promotional payments just for the period January 26, 1999 through May 18, 1999 (JA, at 336); Wawa received $14,065,309 in promotional payments just for the period February 5, 1999 through June 9, 1999 (JA, at 333); Cumberland Farms received $1,205,598 in promotional payments just for the period

January 21, 1999 through April 13, 1999 (JA, at 333); Lucky Grocery Stores received $417,573.65 in promotional payments just for the period January 20, 1999 through April 6, 1999 (JA, at 333); and, just for the period March 19, 1999 through June 25, 1999, Albertson's received promotional payments totaling $672,749.50 (JA, at 335-36). The facts of this case present a modern formulation of the exact discrimination that Sections 2(d) and 2(e) of the Act were enacted to prohibit: large chain retailers receive promotional payments and services by virtue of their size, while small retailers (*i.e.*, the Respondents) receive nothing.

REASONS FOR DENYING THE WRIT

Congress enacted the Act to close a loophole in the Clayton Act. "The [Act] was enacted in 1936 to curb and prohibit all devices by which large buyers gained discriminatory preferences over smaller ones by virtue of the greater purchasing power." *FTC v. Henry Broch & Co.*, 363 U.S. 166, 168 (1960). Because the Act is remedial courts give its provisions a broad construction to achieve its purposes. *See, Jefferson City Pharmaceutical Ass'n., Inc. v. Abbott Labs*, 460 U.S. 150, 159 (1983). In addressing the issue of standing to sue under the Act, the panel below was unanimous in its acknowledgement of the need to recognize the separate and distinct nature of claims under Section 2(a) (price discrimination) and claims under Sections 2(d) and 2(e) (discrimination in promotional services). *Lewis*, at 524, 534; *Petition*, at 15a, 36a. Section 2(a) prohibits discrimination in a seller's payments as well as services in connection with the *original* sale to the purchaser; Sections 2(d)

and 2(e) prohibit discrimination in a seller's payments as well as services in connection with the *resale* by the purchaser. *Lewis*, at 534-35; *Petition*, at 37a-39a; *see, also Kirby v. P.R. Mallory & Co., Inc.*, 489 F.2d 904, 910 (7th Cir. 1973). Philip Morris, in urging an extrapolation of a prohibition on indirect purchasers bringing claims under Section 2(a) to indirect purchasers bringing claims under Sections 2(d) and 2(e), ignores the distinction between the function and purpose of Section 2(a) and the function and purpose of Sections 2(d) and 2(e).

The Sixth Circuit ruled below that only those Respondents that purchase cigarettes directly from Philip Morris have standing to pursue claims under Section 2(a). *Lewis*, at 519; *Petition*, at 2a. The Sixth Circuit's ruling on Section 2(a) standing is based on the requirements of *Barnosky Oils, Inc. v. Union Oil Co.*, 665 F.2d 74 (6th Cir. 1981)("that plaintiffs either purchase directly from the supplier or have the terms of plaintiffs' purchase from wholesalers be controlled by the supplier"). *Lewis*, at 527-28; *Petition*, at 20a-21a. But, as acknowledged below, the requirements of *Barnosky* are inapplicable to an analysis of standing to bring claims for discriminatory conduct under Sections 2(d) and 2(e), which requires a determination, based on the function of those sections in achieving the broad purposes of the Act, of whether a plaintiff is a "customer" or "purchaser" of a defendant supplier.[2] *Lewis*, at 528, 536-37; *Petition*, at 22a, 40a-42a, *citing*, *FTC v. Fred Meyer*, 390 U.S. 341 (1968).

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[2] Although Section 2(d) refers to "customers" and Section 2(e) refers to "purchasers," the words have been interpreted to have the same meaning. *Lewis*, at 522; *Petition*, at 9a.

I. THE DECISION BELOW FOLLOWS *FRED MEYER* AND FULFILLS THE PURPOSES OF THE ACT

In *Fred Meyer*, a Section 2(d) case, this Court specifically rejected a narrow definition of "customer" that would exclude competing retailers from protection under the Act simply because they purchase goods through a wholesaler, rather than from the supplier directly. *Fred Meyer*, at 348-49. In establishing a workable definition of the word "customer" in Section 2(d), based on the broad purposes of the Act, this Court stated, "that the competition with which Congress was concerned in Section 2(d) was that between buyers who competed in resales of the supplier's products . . . Congress' objective was to assure that all sellers . . . competing directly for the same customers would receive even-handed treatment from their suppliers." *Id.*, at 356. Under the ruling in *Fred Meyer*, a supplier such as Philip Morris is required by Section 2(d) of the Act to make available proportionate benefits to all competing customers, whether they purchase directly or through an intermediary wholesaler. *Id.*, at 358. Philip Morris' contention that the holding in *Fred Meyer* is strictly limited to the narrow circumstance where a supplier's direct-buying customer is favored over a customer buying through a wholesaler ignores the functional analysis that is required to achieve the purposes of the Act as enacted, and is mandated by this Court's ruling in *Fred Meyer*. *Id.*, at 348-53. Judge Moore's majority opinion below on the standing of Respondents as indirect purchaser's under Sections 2(d) and 2(e) is focused correctly on the functional reasons behind passage of the Act, as required by *Fred Meyer*. *Lewis*, at 535-37; *Petition*, at 39a-42a. Judge Moore explains

that the existence of an intermediary wholesaler in the original sale of cigarettes to the favored convenience stores, does not distinguish this case from the factual situation in *Fred Meyer*, where, as here, the discriminatory supplier and the favored purchasers have direct dealings and those direct dealings constitute the unlawful behavior. *Lewis*, at 535-37; *Petition*, at 39a-42a. As the record reflects, the direct dealings between Philip Morris and the favored convenience stores are extensive. *Supra.*, at 3-4. Cash rebates and promotional payments are paid directly from Philip Morris to the favored convenience stores; convenience stores enter into promotional agreements with Philip Morris directly; Philip Morris employees solicit the participation of convenience stores in the promotional programs, and monitor the convenience stores' compliance on behalf of Philip Morris directly. In the case where a wholesaler actually exists between Philip Morris and a favored convenience store, that intermediary serves no function in the promotional programs, and has no participation in the promotional programs whatsoever. *Supra.*, at 3-5. In following a functional analysis to determine standing under Sections 2(d) and 2(e), the decision below fulfills the purposes of the Act, and is in accord with *Fred Meyer*.

This Court suggested in *Fred Meyer* that the Federal Trade Commission develop guidelines consistent with its ruling to assist sellers and manufacturers to comply with Section 2(d). *Id.*, at 358. The Commission, an expert agency, complied; the current FTC "Guides for Advertising Allowances and Other Merchandising Payment and Services," (16

C.F.R. §240 (2003)), provide the following definition of "customer:"

> A customer is any person who buys for resale directly from the seller, or the seller's agent or broker. In addition, a "customer" is any buyer of the seller's product for resale who purchases from or through a wholesaler or other intermediate reseller. The word "customer" which is used in section 2(d) of the Act includes "purchaser" which is used in section 2(e).

16 C.F.R. §240.4 (2003). The FTC Guides provide the following definition of "competing customers:"

> Competing customers are all businesses that compete in the resale of the seller's products of like grade and quality at the same functional level of distribution regardless of whether they purchase directly from the seller of through some intermediary.

16 C.F.R. §240.5 (2003). In accordance with *Fred Meyer*, the FTC's definitions reflect Section 2(d)'s broad protection against discrimination in the provision of promotional benefits among competing retailers, whether they purchase directly from a manufacturer or through a wholesaler.

Accordingly, the facts in this case are that the favored retailers, the convenience stores, whether they purchase directly from Philip Morris or through

wholesalers, are "customers" of Philip Morris, and Respondents, the majority of whom purchase through wholesalers, are also "customers" of Philip Morris. For purposes of Section 2(d) of the Act, the convenience stores and the Vendors are "competing customers" of Philip Morris.

Philip Morris' argument that the decision below impermissibly expands the reach of the Act is based on a selective reading of contemporary economists who theorize that the Act no longer serves a competitive purpose. The decision below follows this Court's precedent in *Fred Meyer* by recognizing the function and purpose of Sections 2(d) and 2(e), as enacted. The Sixth Circuit has not expanded the Act by ruling that Respondents, under the facts presented in this case, fall within the definition of "customer" and "purchaser," as those words are used in Sections 2(d) and 2(e), based on an analysis of the functional relationship between Philip Morris and its favored and disfavored customers, as mandated by *Fred Meyer*.[3] Whether or not the Act continues to serve a beneficial purpose in our economy is ultimately a question left to Congress.

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[3] To quote Judge Eschbach of the Eleventh Circuit: "when confronted with contemporary economic argument on the one hand and judicial precedent on the other, we feel, unlike those of a more activist bent . . . that economic argument is not ultimately controlling; judicial precedent is." *Alan's of Atlanta, Inc. v. Minolta Corporation*, 903 F.2d 1414, 1418 n. 6 (11th Cir. 1990).

II. NO TRUE CONFLICT EXISTS AMONG THE THE DECISION BELOW AND THE SECTION 2(a) CASES IN THE SECOND, THIRD, FIFTH AND ELEVENTH CIRCUITS CITED BY PETITIONER

Philip Morris contends that the decision below warrants review because it creates a conflict with decisions of the Second, Third, Fifth and Eleventh Circuits. In fact, much like *Barnosky*, *supra.*, which the Sixth Circuit followed below, all of the decisions cited by Philip Morris turn on the issue of an indirect purchaser's standing to bring a claim under Section 2(a) of the Act, and are inapposite to the issue presented on review.[4] As discussed, *supra*, Philip Morris is seeking review of the decision below, made in accordance with *Fred Meyer*, that Respondents meet the definition of "customer" and "purchaser" to establish standing under Sections 2(d) and 2(e) of the Act. Philip Morris is *not* seeking review of whether the decision below properly applied a prohibition on indirect purchasers bringing suit under Section 2(a). Accordingly, there is no true conflict between the decision below and the circuit decisions cited by Philip Morris.

Finding no true conflict between the decision below and any other circuit decision that has considered the standing of an indirect purchaser under Sections 2(d) and 2(e) since *Fred Meyer*, Philip Morris launches an undisguised attack on *Fred Meyer* itself. It is not required under *Fred Meyer* that an indirect-purchaser

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[4] *FLM Collision Parts, Inc. v. Ford Motor Co.*, 543 F.2d 1019, 1028 (2d Cir. 1976); *Klien v. Lionel Corp.*, 237 F.2d 13, 15 (1956); *Hiram Walker, Inc. v. A&S Tropical, Inc.*, 407 F.2d 4, 7-8 (5th Cir. 1969); and, *Pierce v. Commercial Warehouse*, 876 F.2d 86, 87 (11th Cir. 1989).

plaintiff purchase through a wholesaler that is controlled by a manufacturer to establish standing under Sections 2(d) and 2(e). Philip Morris is obviously disgruntled by the Court's reasoning in *Fred Meyer* that a plaintiff meets the statutory definition of "customer" and "purchaser" in Sections 2(d) and 2(e), "even where they purchase from independent wholesalers who are not 'controlled' by a single seller." *Petition*, at 22. *Fred Meyer* established the law in this area some 36 years ago. The FTC has repeatedly published guidelines based on *Fred Meyer's* interpretation of standing under Section 2(d) of the Act. Respondents respectfully submit that nothing in the facts or procedural posture of this case warrants a reassessment of the functional interpretation of standing to bring claims under Section 2(d), as established in *Fred Meyer*, much less disturbing that long-established and viable precedent.

III. NO NOVEL OR IMPORTANT QUESTION OF FEDERAL LAW AFFECTING PRODUCT PROMOTION AND DISTRIBUTION IS RAISED BY THE DECISION BELOW

Philip Morris maintains that nationwide sellers, as a result of the decision below, will be required to: (1) offer promotional payments and services to "customers" who purchase cigarettes indirectly (as, indeed, they have been required to do so since *Fred Meyer*); or (2) curtail their promotional programs; or (3) conform to a "novel" interpretation of *Fred Meyer* within the Sixth Circuit, yet still abide by some unexplained formulation of *Fred Meyer* elsewhere in the nation; or (4) openly flaunt the prohibitions against discriminatory conduct contained in Sections 2(d) and

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2(e) of the Act. *Petition*, at 24-25. In reality, Philip Morris' only choice is to conform to the prohibitions of Sections 2(d) and 2(e) or ignore them to further its narrow business interests at its peril. Its dilemma does not rise to the level of an important question of federal law.

The FTC guidelines, *supra*, 9, which define the words "customer" and "competing customer" to include indirect purchasers (in accordance with *Fred Meyer*); have been in nationwide effect for more than 30 years. *Fred Meyer* and the FTC guidelines have served the business community by establishing a framework for the design and implementation of retail promotional programs. Philip Morris presents insufficient grounds to disturb these time-tested principles. The business community relies on stability in the law, and the disruption caused by Philip Morris' proposal to reinterpret distributional relationships militates against a grant of the writ of certiorari. If Philip Morris simply improves its own conduct by actually following the FTC guidelines, it will have no difficulty in conforming to the requirements of *Fred Meyer* on a nationwide basis.

Philip Morris is not challenging the remand of this case for the trial of claims by Respondents who have purchased cigarettes directly from it in the past. As it relates to the claims of indirect-purchaser Respondents under Sections 2(d) and 2(e) of the Act, the record below is replete with disputes over material facts relating to the nature of Philip Morris' direct transactions with its favored customers, the convenience stores. *Supra*, at 4-5. Prior to the resolution of these material issues of fact at trial, this

Court's review of the decision below would be premature. In sum, once a mandate issues from the Sixth Circuit, this case is where it belongs, awaiting trial on the merits before the district court.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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